IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-736

SOUTH AFRICAN MARINE CORPORATION, LTD.,

Petitioner,

—v.—

ELGIE & COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Second Circuit, first entered in this case June 11, 1979, as to which rehearing was denied August 10, 1979.

Opinions Below

The opinions of Judge G. Goettel of the United States District Court for the Southern District of

New York, neither being officially reported,[1] are set forth in chronological order in Appendix A, *infra,* at pages 1a and 25a, respectively. The opinion of the United States Court of Appeals, Second Circuit, reported at 599 F.2d 1177 (2d Cir. 1979), is set forth in Appendix B, *infra,* at page 1b. The Order of the Court of Appeals which denies Appellant's petition for rehearing is set forth in Appendix C, *infra,* at page 1c.

Jurisdiction

On June 11, 1979, the Court of Appeals entered its judgment reversing the decision of the District Court insofar as it limited Petitioner's liability to $500 under the provisions of the United States Carriage of Goods by Sea Act, 46 U.S.C. § 1300 *et seq.* A timely petition for rehearing en banc was denied on August 10, 1979, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1976).

Question Presented

1. Is the Carriage of Goods by Sea Act's package limitation provision, providing that "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to . . . goods in an amount exceeding $500 per package . . . ," 46 U.S.C.

[1] Judge Goettel's two opinions are reported at 1976 A.M.C. 2446 (S.D.N.Y. 1976), and 1978 A.M.C. 2189 (S.D.N.Y. 1978), respectively.

§ 1304(5), totally vitiated by the preservation in COGSA of the Pomerene Bills of Lading Act, which provides that a carrier is liable for his agent's actions in misdescribing goods in a bill of lading, 49 U.S.C. § 102, when the goods were in fact received and loaded on a previous vessel and the bill of lading provided for substitution of vessels?

Statutes Involved

The Carriage of Goods by Sea Act, Title 46:

§ *1303(4). Bill as prima facie evidence*

Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3)(a), (b), and (c) of this section: *Provided,* That nothing in this chapter shall be construed as repealing or limiting the application of any part of the Act of August 29, 1916, commonly known as the "Pomerene Bills of Lading Act" [49 U.S.C. 81 et seq.]

§ *1304(4). Deviations*

Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: *Provided, however,* That if the deviation be for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

§ 1304(5) Amount of Liability; valuation of cargo

Neither the carrier nor the ship shall *in any event* be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, *unless the nature and value of such goods have been declared by the shipper* before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier. [Emphasis added].

By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided,* That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

The Pomerene Bills of Lading Act, Title 49

§ 102. Liability for nonreceipt or misdescription of goods

If a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading therefor for transportation in commerce among the several States and with foreign nations, the carrier shall be liable to (a) the owner of goods covered by a straight bill subject to existing right of stoppage in transitu or (b) the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, or upon the shipment being made upon the date therein shown, for damages caused by the nonreceipt by the carrier of all or part of the goods upon or prior to the date therein shown, or their failure to correspond with the description thereof in the bill at the time of its issue.

Statement of the Case

This case centers on an issue of vital importance to the maritime and insurance industries of the United States because it involves the applicability of the United States Carriage of Goods by Sea Act's (hereinafter "COGSA") package limitation to a frequent occurrence in maritime commerce—the shortage of one or two packages from a shipment of cargo. In a startling and radical departure from other decisions of the Second Circuit Court of Appeals, as well as a decision from the Supreme

Court of the United States, the Second Circuit Panel has created a new category of absolute liability for a simple short delivery of packages of cargo at a port of discharge and which totally deprives the ocean carrier of its right to the $500 per package limitation of liability found in COGSA § 4(5), 46 U.S.C. § 1304(5).

The facts in this case are simple. In late 1973, a South African corporation ordered certain optical equipment from a New York manufacturer. Eventually, the order was prepared and packaged into eleven cartons and one crate. The shipper then arranged through its freight forwarder for the carriage of the goods from New York to Durban, South Africa, and the cargo was booked with Petitioner's line. Petitioner is the owner and operator of South African Marine Corporation which is one of the many ocean carriers that service South Africa with ocean transportation.

When the shipment was received by the Petitioner at its pier, a Dock Receipt was obtained by the shipper's agent for the twelve packages. The actual receipt was issued by International Terminal Operating Company, Inc. (hereinafter "ITO") which was the terminal operator and the contract stevedore loading vessels for and on behalf of Petitioner. Eventually, a bill of lading was issued to the shipper indicating that the twelve packages had been "received for shipment." This bill of lading was dated March 15, 1974. The cargo at the time the bill of lading was issued was scheduled to go on board the S/A MORGENSTER, the first of Petitioner's vessels to be sailing to Durban after the cargo arrived on the pier.

However, ITO subsequently informed Petitioner that all twelve pieces had been "shut out" for lack of space from the MORGENSTER and that they would have to be carried on the next vessel, the S.A. NEDERBURG, which was plying the same trade route one week later. The S.A. NEDERBURG arrived in New York and loaded various cargoes the next week. After the S.A. NEDERBURG's departure, Petitioner reviewed ITO's Dock Receipts and issued a bill of lading stamped "on board" for all twelve pieces. This "on board" stamp signified that the cargo stated in the bill had in fact been loaded on the indicated vessel, in this case the S.A. NEDERBURG.

When the S.A. NEDERBURG arrived in Durban, South Africa, only eleven pieces could be located on that vessel, and as a result, the plaintiff in this action, the consignee of the shipment, was notified that one piece was short, a crate containing an optical generator. Some evidence (a loading tally) was introduced by ITO indicating that the missing crate was loaded on the prior vessel, the S.A. MORGENSTER, and the Court so found. The crate, however, was never located at Durban.

The case was tried before Judge G. Goettel of the Southern District of New York who awarded judgment for Elgie & Company but limited recovery to $500 in accordance with the terms of the bill of lading, which contained a $500 per package limitation clause, and the Carriage of Goods by Sea Act, which was incorporated in the bill of lading and also contains a $500 limitation.

The decision was appealed to the Second Circuit Court of Appeals by the Petitioner. The Second Cir-

cuit heard argument on appeal and remanded the case for specific findings concerning the applicability of the Pomerene Bills of Lading Act, 49 U.S.C. §§ 81-124 (1976) (hereinafter "Pomerene Act"), an issue raised *sua sponte* by the Court. Neither cargo's attorneys nor the carrier's attorneys had made any reference to such act. In addition, the Court of Appeals requested a specific finding as to whether the optical generator had gone forward on the S.A. MORGENSTER.

Judge Goettel's second opinion specifically found the Pomerene Bills of Lading Act inapplicable and that the optical generator did in fact go forward on the MORGENSTER. (page 32a *infra*).

The Court of Appeals for the Second Circuit reviewed the case after the District Court's second opinion. This time the Second Circuit revised the District Court's conclusion that the $500 limitation applied as the Second Circuit found the Pomerene Act § 22, 49 U.S.C. § 102, nullified the $500 limitation granted by Congress "in any event" in COGSA.

This surprising interpretation comes sixty-three years after the enactment of the Pomerene Act and forty-three years after the enactment of COGSA. It is frankly inconceivable that Congress would have specifically preserved the Pomerene Act in § 3(4) of COGSA, 46 U.S.C. § 1303(4), had it intended § 22 of that act to nullify the $500 package limitation. As the District Court stated in its second opinion:

> If the package limitation of COGSA is inapplicable because of the Pomerene Act in a negligent loss of cargo case, the burden of proof and the relationships among the parties to these maritime commercial transactions would be dramatically altered some 62 years after the Pomerene Act was first passed. The Act's scope was not intended to be so great since its purpose lay in curbing deliberate fraud.

(page 30a *infra*).

The Second Circuit's new interpretation of § 22 is based on their review "of that section in its historical context." (page 5b *infra*). The legislative history of the Pomerene Act, discussed *infra,* does not in any way support the Second Circuit's conclusion, and, in fact, the text of § 22 by itself demonstrates that the section is inapposite in the present case.

According to its plain meaning, § 22(b) cannot apply in the present case. It is not enough that the holder of a bill of lading has relied upon the description of goods in the bill of lading; § 22(b) also requires that his *damages be caused by* either (1) nonreceipt of the goods as of the date stated in the bill of lading, or (2) the failure of the goods to correspond with their description in the bill of lading at the time of issue. There can be no doubt that the carrier (Petitioner herein) received all twelve packages, including the crate containing the optical generator, prior to issuing its "received for shipment" bill of lading on March 15, 1974. This was clearly evidenced at the trial by the Dock Receipt and has not been disputed by any of the parties in this case. Therefore, the first causal element, nonreceipt by the carrier, obviously does not exist. A reasonable construction of the alternative cause, failure of the

goods to correspond with their description in the bill of lading at the time of its issue, also deprives the statute of application here, since the "received for shipment" bill of lading dated March 15, 1974, was perfectly accurate in its description of the nature and number of packages received into Petitioner's custody on that date, as well as the marks and weight.

Section 22 of the Pomerene Act does not require that the goods correspond to their description in an "on board" bill; it makes no distinction between an "on board" and a "received for shipment" bill because the carrier fulfills its duty under this section of the act by taking custody of the goods, whether or not they are actually loaded on a particular vessel. The bill of lading contained the usual clause allowing a carrier to substitute vessels, and since one crate had gone on an earlier vessel, there can be no doubt that all packages were on board a vessel as of the date that the "on board" stamp was placed on the bill of lading. It becomes quite clear when the statutory language is interpreted in light of the purpose and historical text of the Pomerene Act that the preservation of the Pomerene Act in COGSA was not intended to nullify the limitation of COGSA which was enacted to bring the U.S. into step with the many maritime nations which had adopted the Hague Rules in an effort to unify international maritime law relating to carriage of goods.

The Circuit Court's opinion examined the history of the Pomerene Bills of Lading Act and found it to override COGSA. Consequently, the Court of Appeals ruled that the plaintiff was entitled to recover full damages.

In so doing, the United States Court of Appeals, Second Circuit:

1. totally ignored the nearly fifteen year legislative history of the Carriage of Goods by Sea Act;

2. for the proposition of unlimited recover, mistakenly placed its reliance on *Toho Bussan Kaisha Ltd. v. American President Lines,* 155 F. Supp. 886 (S.D.N.Y. 1957), *aff'd,* 265 F.2d 418 (2d Cir. 1959), a case ultimately governed by New York law;

3. misinterpreted its own opinions as to quasi-deviation in *Illigan Integrated Steel Mills, Inc. v. S.S. JOHN WEYERHAUSER,* 507 F.2d 68 (2d Cir. 1974), *cert. denied,* 421 U.S. 965 (1975);

4. attempted to give new life to ancient common law principles long since intentionally laid to rest by the Carriage of Goods by Sea Act.

REASONS FOR GRANTING THE WRIT

1.

The decision below has failed to consider the intent of Congress, and as a result has created an unprecedented conflict between two federal statutes which had previously been in harmony for forty-three years.

The Circuit Court's opinion in this case creates for the first time in forty-three years a conflict between two federal statutes: the Pomerene Bills of Lading Act, and the United States Carriage of Goods by Sea Act. This conflict, if permitted to continue, will significantly alter and disrupt the statutorily defined relationships between shippers and carriers in international export trade. It will play havoc not only with maritime commerce from the United States (the Pomerene Act applies only to *outbound* bills of lading, 49 U.S.C. § 81) but also will throw into confusion the insurance carriers who cover cargo, on one side, and carriers and their contractors on the other. Thus, the measure of liability for cargo being shipped from the United States will be in conflict with that for cargo moving between other maritime nations as well as with that for cargo coming into the United States.

The Circuit judges very ably analyzed the vicissitudes of the day sixty-three years ago which generated the Pomerene Bills of Lading Act, 49 U.S.C. §§ 81-124 (1976). *It is fundamental, however, that the Pomerene Act has effect only so long as it is not modified by subsequent legislation.* Since the Carriage of Goods by Sea Act succeeded the Pomerene Act by twenty years, it is necessary to analyze COGSA in order to determine what portion of the Pomerene Act remains. As the legislative history of COGSA indicates, specific attention was given to the Pomerene Act, and *the Pomerene Act was specifically retained only insofar as it changed the common law so as to bind the carrier to the ultra vires act of the carrier's agent.* Nowhere is there any indication that Congress intended to permit a non-fraudulent mistake in a bill of lading to oust an international body of law which had taken more than thirteen years to be enacted.

The Pomerene Act became federal law in 1916, and it is undisputed that Section 22 of the Pomerene Act is entirely remedial in nature. A practice had grown up in the Texas cotton trade whereby shippers and the agents of carriers fraudulently issued bills of lading for goods which the carrier never received whereupon these fraudulent bills of lading could then be traded to innocent third parties. The defrauded third parties were then precluded from proceeding against the carrier for non-delivery as the act of the carrier's agent in fraudulently issuing the bill of lading was held at common law to be *ultra vires. Friedlander v. Texas Pacific Railway,* 130 U.S. 416 (1888).

Accordingly, the Pomerene Act was enacted to bind carriers to the acts of their agents, in essence "a codification of the estoppel principle." *Portland Fish Co. v. State Steamship Co.,* 510 F.2d 628, 631 (9th Cir. 1974); A. Knauth, *The American Law of Ocean Bills of Lading,* 388-394 (4th ed. 1953).

COGSA, 46 U.S.C. § 1300 *et seq.* (1976), arose out of an international desire to establish a uniform format for the ocean bill of lading to be used in international commerce.[2] The bill which ultimately became COGSA in 1936 was introduced in the Senate of the United States as S. 1152, 74th Cong., 1st Sess. (1935). As introduced, S. 1152 was virtually identical to the international protocol concluded at Brussels, Belgium on June 23, 1925, and which became known as the Hague Rules. In particular the protocol and S. 1152 each contained the following provision:

> Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3)(a), (b) and (c) of this section.

Hearings on S. 1152 Before the Comm. on Commerce, United States Senate, 74th Cong., 1st Sess. 2 (1935) [hereinafter cited as *Hearings on S. 1152*]. Indeed, this identical provision had been included in bills which had been introduced in the House of Representatives and the Senate to implement the Hague Rules in the United States as early as 1923.

Hearings were held in 1935 at which Mr. A.B. Barber of the Chamber of Commerce of the United States appeared on behalf of the Conference on Uniform Ocean Bills of Lading held in November, 1930. Mr. Barber proposed six amendments to S. 1152, one of which amendments hoped to add the following to the provision dealing with prima facie evidence.

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[2] A similar desire among the states of the United States produced the Harter Act, 46 U.S.C. § 190 *et seq.* (1976), in 1893 to govern maritime bills of lading in interstate commerce.

> Provided, that nothing in this Act shall be construed as repealing or limiting the application of any part of the Act, as amended, "An Act relating to bills of lading in interstate and foreign commerce", approved August 29, 1916 (U.S.C. title 49, secs. 81-124) commonly known as the "Pomerene Bills of Lading Act."

Id. at 27. As Mr. Barber represented the drafters of the amendment and gave the *only* testimony concerning it, his statements are crucial.

> The foregoing amendment . . . *is intended to preserve in effect the provisions of the Pomerene Act which hold a carrier liable for receipt of goods signed for by its representatives,* even though they may not actually have been received, this provision of the Pomerene Act having been found necessary to prevent certain abuses that were being practiced with damage resulting due to the negotiable character of the bill of lading. The proposed amendment would also leave in effect provisions of the Pomerene Act in possible cases where loading of shipments going by ocean transport may be done by the shippers. . . . *We have to preserve the Pomerene Act in certain particulars, the most significant one being that the signature of the carrier that he has received the goods is conclusive evidence of the receipt of the goods.* Our proposed amendment would preserve the Pomerene Bills of Lading Act *in that respect* because very serious abuses had arisen before the enactment of the Pomerene Act, and those abuses would be permitted again,

> if that feature of the Pomerene Act was eliminated. *So it is the purpose of our amendment to preserve the Pomerene Act in that particular.* (Emphasis added).

Id. at 27 (statement of A.B. Barber).

Mr. Barber also placed before the Committee a pamphlet contrasting the then present and proposed laws and recommending amendments to an earlier proposal to codify the Hague Rules. The amendment was explained by the pamphlet as follows.

> 1. In order to bring the proposed bill into accord with existing law, it was recommended that section 3, paragraph 4, providing that the bill of lading shall be prima facie evidence of the receipt of the goods by the carrier, be amended at the proper point in the bill to preserve in full force and effect the provisions of the Pomerene Bills of Lading Act, *with reference to matters referred to in this paragraph.* (Emphasis added).

Id. at 33. Mr. Thomas B. Paton was on hand to testify for the American Bankers' Association and indicated that the bankers were in total support of Mr. Barber's proposed amendment.[3] *Id.,* at 43 (statement of Thomas B. Paton).

On May 28, 1935, S. 1152 was reported out of committee with amendments and accompanied by S. REP. No. 742, 74th Cong., 1st Sess. (1935). The

[3] As testified to by Mr. Paton at earlier hearings, even this limited retention of Pomerene was not considered vital by the bankers. *Relating to the Carriage of Goods by Sea Act, Hearings Before the Comm. on Merchant Marine and Fisheries, House of Representatives,* 68th Cong., 2d Sess. 141 (1925).

report recommended to the Senate the very same amendment proposed by Mr. Barber as to the degree of proof furnished by a signed bill of lading. The Committee Report stated that the

> . . . amendment is intended to preserve in effect the provisions of the Pomerene Act which hold a carrier liable for receipt of goods signed for by its representatives even though they may not actually have been received. . . . The proposed amendment would also leave in effect provisions of the Pomerene Act in possible cases where loading of shipments going by ocean transport may by done by the shippers, cases which are not otherwise adequately provided for by the bill.

Id. at 1, 2.

The amended bill was subsequently passed by the House with only grammatical changes and no further comment on the Pomerene Act. The President signed the bill into law, and the pertinent provision has remained unamended as follows:

> (4) *Bill as prima facie evidence*
>
> Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3)(a), (b) and (c), of this section: *Provided,* that nothing in this chapter shall be construed as repealing or limiting the application of any part of the Act of August 29, 1916, commonly known as the "Pomerene Bills of Lading Act" [49 U.S.C. 81 et seq.]

46 U.S.C. § 1303(4) (1976).

A clearer expression of the intent of Congress in the Pomerene retention could not be expected. All of the reports and hearings indicate that the reference to the Pomerene Act is intended specifically to preserve its estoppel effect. In the event of conflicting statutory provisions it is the duty of the court to harmonize the provisions in keeping with the full background of the law. *Bailey v. U.S.*, 511 F.2d 540 (Ct. Cl. 1975).

The Second Circuit, in its misinterpretation of the statute, has *created* an undreamed of conflict between the Pomerene Act and COGSA. The leading authority on bills of lading has recognized only two possible conflicts between the statutes. A. Knauth, *Ocean Bills of Lading, supra,* at 398, 391. These conflicts are easily resolved by Knauth in keeping with the intent of Congress without a wholesale ouster of COGSA in applying the Pomerene Act. *Id.* Under the Second Circuit's unique construction, any mistake in the bill of lading would have the effect of completely ousting COGSA, the very statute governing all international bills of lading. Any unexplainable shortage (as most are) would result in an inaccurate bill of lading which could be used to get around the package limitation which is basic to insurance coverage. As pointed out in *Portland Fish Co. v. State Steamship Co., supra,* the Pomerene Act is only a codification of the estoppel principle. Accordingly, the Pomerene Act renders the carrier liable for the mistake of his agent, but the measure of his liability is still subject to his remaining defenses. These defenses are codified by COGSA and include the package limitation.

The Circuit Court's reliance on *Toho Bussan Kaisha, Ltd. v. American President Lines Ltd.,* 155 F. Supp. 886 (S.D.N.Y. 1957), as supporting the proposition that the Pomerene Act also establishes the measure of damages will not withstand scrutiny. At the outset, that case did not involve suit for a breach of the contract of carriage, but rather suit for a *fraud knowingly perpetrated by the carrier outside the contract of carriage. Id.* at 889. Accordingly, the *Toho* court found COGSA to be inapplicable and the Pomerene Act to apply independently of COGSA, facts which the opinion below failed to appreciate. The language in the *Toho* opinion cited by the Court below is founded in pre-COGSA law and has no bearing on the interplay of the statutes in this case. The reliance of the Second Circuit on *Toho* is rendered totally incomprehensible by a reading of its own opinion affirming that of the district court, *Toho Bussan Kaisha, Ltd. v. American President Lines, Ltd.,* 265 F.2d 418 (2d Cir. 1959). A reading of that opinion reveals *no mention of COGSA or the Pomerene Act.* Rather, *New York law was held to govern* the action which the court characterized as "a common law fraud action." *Id.* at 421. Clearly, the *Toho* opinion is completely irrelevant to the instant case.

The broad expansion of the Pomerene Act judicially applied to permeate all aspects of COGSA receives no support from the commentators or the cases. The clear implication is that the Pomerene Act is retained to bind the carrier to the acts of his agents. W. Poor, *Poor on Charter Parties and Ocean Bills of Lading,* § 64 (5th ed. 1968); A. Knauth, *The American Law of Ocean Bills of Lading, supra,* at

85, 86. It is evident that 46 U.S.C. 1303(4) which preserves the Pomerene Act was not intended to reach beyond that subsection to invade other COGSA provisions which are basic to a statute aimed at international uniformity. *Mitsui & Co. v. M/V EASTERN TREASURE,* 466 F. Supp. 391, 395, 396 (E.D. La. 1979). Certainly the package limitation of COGSA makes it absolutely clear that that subsection is to be held inviolate.

> Neither the carrier nor the ship shall *in any event* be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package . . . . [Emphasis added].

46 U.S.C. § 1304(5) (1976). As is amply discussed by the various hearings and committee reports relating to COGSA, this provision serves to *increase* the measure of the carrier's liability beyond that existing at common law to an irreducible minimum. These same documents show that the language "to or in connection with the transportation of" extends this irreducible minimum to all aspects of the contract to which COGSA has been extended. Furthermore, it is axiomatic that when two provisions of a statute are in conflict, the one last in order will control. *Inter-Continental Promotions, Inc. v. MacDonald,* 367 F.2d 293 (5th Cir. 1966), *cert. denied sub nom. Miami Beach First National Bank v. Inter-Continental Promotions, Inc.,* 393 U.S. 834 (1968), *appeal after remand,* 441 F.2d 1356 (5th Cir. 1971), *cert. denied,* 404 U.S. 850 (1971), *rehearing denied,* 404 U.S. 961 (1971).

Accordingly, the effect of the Pomerene Act here is only to prevent the carrier from denying receipt of eleven cartons and one crate; a denial which Petitioner has never interposed. The measure of the carrier's liability in damages is governed by COGSA. Since the shipper did not state the value of the cargo in the bill of lading, thereby obtaining a lower freight rate, the carrier's liability is fixed by federal law at no higher than five hundred dollars per package. As is clear from the statute itself, the proper route for avoiding the package limitation is a declaration of the value of the cargo in the bill of lading.

The Second Circuit's holding that a simple error in the preparation of the bill of lading may void the provisions of COGSA and reinstate common law not heard from in over forty years essentially creates a fight to the death between two statutes. Similar though not identical cases have offered other courts a similar problem. Never before has the approach taken by the Second Circuit been adopted. *See Page Communications Engineers, Inc. v. Hellenic Lines, Ltd.,* 365 F. Supp. 456 (D.C. 1973). The approach taken in the opinion below is clearly repugnant to all principles of statutory construction and does violence to the purpose of the retention of the Pomerene Act in the ratification of the Hague Rules as construed by the Department of State and communicated to the international community. A. Knauth, *supra,* at 77-88. Such a dramatic reinstatement of common law principles may only be properly accomplished by the legislature which overruled those principles domestically in implementing an international compromise over forty years ago.

2.

The Circuit Court's Half-Hearted Attempt to Apply Principles of Deviation Places It in Conflict With the Law Both Before and After COGSA.

The Circuit Court, justifiably uneasy with its construction of COGSA, then made a brief attempt to turn the instant case into one of deviation. The recitation in the opinion below of the deviation principles enunciated in *Olivier Straw Goods Corporation v. Osaka Shosen Kaisha,* 47 F.2d 878 (2d Cir. 1931), *cert. denied,* 283 U.S. 856 (1931), is clearly inapposite. There it was held that a bill of lading reciting that goods had been shipped when in fact they were still in storage would be likened to a deviation ousting limitation clauses in the contract of carriage At the outset such a concept of quasi-deviation has not lasted the ensuing forty-eight years, particularly in the Second Circuit, which has severely limited the doctrine. *Illigan Integrated Steel Mills, Inc. v. S.S. JOHN WEYERHAUSER,* 507 F.2d 68, 72 (2d Cir. 1974), *cert. denied,* 421 U.S. 965 (1975). Furthermore, the entire doctrine of quasi-deviation has little basis in current law and is properly falling into disfavor. G. Gilmore and C. Black, *The Law of Admiralty,* 177 (2d ed. 1975).

In its recitation of the forty-five year old principles of *Olivier,* the court below failed to confront the fact that *the opinion was rendered five years before the sweeping changes wrought by the enactment of COGSA.* In pertinent part COGSA provides " . . . any reasonable deviation shall not be deemed to be an infringement or breach of this chapter or of

the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom . . ." 46 U.S.C. § 1304(4) (1976). The court below engaged in no discussion as to whether an *Olivier* situation would constitute an unreasonable or a reasonable deviation under current law today, much less whether inadvertently shipping one package before the other constitutes such a basic breach. Furthermore, while an unreasonable deviation may be a *breach* of the contract of carriage and COGSA, and at common law may be sufficient to oust the *contract of carriage,* a federal *statutory provision* such as the package limitation of COGSA is not susceptible to a similar *ouster. Atlantic Mutual Insurance Company v. Poseidon Schiffahrt,* 206 F. Supp. 15, 19 (E.D. Ill. 1962), *aff'd,* 313 F.2d 872 (7th Cir. 1963); G. Gilmore and C. Black, *supra,* at 180.

Even on its facts, *Olivier* is only superficially similar to the instant case and does not make it susceptible to a deviation analysis. The foundation of the analysis in *Olivier* was a fundamental breach of the contract of carriage in *not shipping the goods at all. Olivier Straw Goods Corporation v. Osaka Shosen Kaisha, supra* at 879. In the instant case the missing crate was shipped but on a vessel substituted in place of that indicated in the bill of lading. Substitution of vessels was expressly permitted by the long form bill of lading.

Further, in *Olivier* and its supporting authorities, the act construed as being a quasi-deviation was causally related to the loss of the goods—a key factor in the opinions. Clearly, there is no such causal connection here. In attempting to characterize the error in the bill of lading as a deviation, the Court

below has made the common mistake of having "spoken loosely of deviation" when in reality a simple breach of the contract of carriage is involved. *The Citta Di Messina,* 169 F. 472, 476 (S.D.N.Y. 1909).

In short, the Second Circuit has attempted a heretofore unheard of extension of the already strained doctrine of quasi-deviation. It clearly has no place in current law.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals, Second Circuit.

Respectfully submitted,

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Of Counsel

Appendices

APPENDIX A

Opinions of the District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
74 Civ. 5112 (GLG)

ELGIE & COMPANY,

Plaintiff,

—against—

S. S. "S.A. NEDERBURG", her engines, boilers, etc., and SOUTH AFRICAN MARINE CORPORATION, LTD.,

Defendant and Third-Party Plaintiffs,

—against—

INTERNATIONAL TERMINAL OPERATING COMPANY, INC.,

Third-Party Defendant.

OPINION[1]

Appearances:

BIGHAM, ENGLAR, JONES & HOUSTON
Attorneys for Plaintiff
99 John Street
New York, N.Y. 10038
By: J. T. Kochendorfer, Esq.
Of Counsel

[1] This case was tried by stipulation before the undersigned when a U.S. Magistrate. The parties further stipulated that it could be decided by the undersigned after induction as a U.S. District Judge.

HAIGHT, GARDNER, POOR & HAVENS
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One State Street Plaza
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By: M. E. DeOrchis & B. D. Starer, Esqs.
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New York, N.Y. 10038
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Of Counsel

GOETTEL, D. J.

This is another episode in the continuing saga of the package limitation clause in ocean carriers' bills of lading: "no stranger to this court." *Toyomenka, Inc. v. S.S. Tosaharu Maru,* 523 F.2d 518, 519 (2d Cir. 1975). It is of that particular genus involving erroneous bills of lading and, as such, further explores the ramifications of *Miles Metal Corporation v. M.S. Havjo,* 494 F.2d 563 (2d Cir. 1974).

The plaintiff, Elgie & Company, purchased from Shuron Continental, in 1973, an optical grinding machine referred to as a generator (since it generates ophthalmic curves on lenses), along with certain additional parts and machinery. The goods were packed in Tampa, Florida for shipment to South Africa. The generator was packed in a large crate and the parts were packed in smaller containers or cartons. The goods were sold pursuant to invoice against an irrevocable letter of credit which called for the draft to be accompanied by an "on board" shipping company bill of lading marked "freight prepaid." The generator itself, exclusive of parts, was invoiced at $8,670. Including freight and insurance, its value came to $10,559.47.

The answer admits that the defendant, South African Marine Corporation, Ltd., is a foreign corporation engaged in international shipping and that the case is, therefore, governed by the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. § 1300 *et seq.* The defendant ship line admits receipt of the goods in question, the issuance of a bill of lading covering all of the goods denoted therein, and that at least one piece of the freight listed was apparently not loaded aboard the S.A. Nederburg (as indicated in the bill of lading) nor delivered to plaintiff.

The seller's freight forwarder testified to the delivery of the goods from Tampa to the New York pier and the obtaining of a dock receipt from the defendant. The invoice, dock receipt and the bill of lading established that the crate was supposed to contain the generator purchased by plaintiff. The crate and the smaller cartons were not opened at any time en route, but they were weighed and they conformed to the original shipment in weight and volume. (The goods arrived in New York on December 12, 1973, but were not forwarded to the pier until March 13, 1974.)

The goods were originally listed for shipment aboard the S.A. Morgenster, another vessel owned by the defendant ship line. The terminal to which the goods were delivered is operated by the third-party defendant, International Terminal Operating Company, Inc., ("ITO"), who are also the stevedores. They

issued the dock receipt and had custody of the goods until they were to be loaded aboard the defendant's vessel. While there was considerable confusion in the testimony, a reasonable conclusion to be drawn from it was that both the large crate and the smaller eleven cartons were moved out by the stevedores to be loaded aboard the Morgenster. The Morgenster, however, was overbooked. Some cargo was intentionally shut out, but it does not appear that any of the plaintiff's cargo was intentionally shut out. The records indicate that the one large crate was probably loaded on the Morgenster.[2]

A day or two after the Morgenster sailed the stevedores discovered a number of plaintiff's cartons, intended for the Morgenster, still on the pier. They, therefore, changed the papers to indicate that all of the cargo would go forward on defendant's next vessel, the S.A. Nederburg, which was then commencing loading.[3] Tally sheets and other records make it fairly clear that only the eleven cartons were actually loaded aboard the Nederburg.

There was a sharp conflict in the testimony between the defendant shipper and the third-party defendant stevedore concerning the handling of cargo

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[2] On March 15, 1974, according to its tally sheets, I.T.O. loaded aboard the "S.A. MORGENSTER" one crate of the subject shipment pursuant to the shipping request contained in the dock receipt.

[3] On March 21, 1974, the S.A. NEDERBURG arrived in Brooklyn, New York and berthed at I.T.O.'s terminal at 59th Street Pier. From March 21 through March 24, 1974, I.T.O. loaded cargo in all hatches of the S.A. NEDERBURG for South and East African ports, including Durban, South Africa. On March 24, 1974, the S.A. NEDERBURG sailed for South and East African ports, including Durban, South Africa.

under circumstances such as outlined above, resulting partly from the fact that the procedures were changed about this time. The ship line maintains that the stevedores notified it, by sending them a copy of the dock receipt which indicated that none of plaintiff's cargo had been loaded aboard the Morgenster, that all of the cargo would be placed aboard the Nederburg. The stevedores, on the other hand, contend that the system of sending copies of dock receipts for left behind cargo had been abandoned and that an actual list of remaining cargo was made so that it was the shipper's responsibility to know what had been left on the pier. The stevedores do acknowledge that previously there had been a duty to call to the attention of the ship line any "split shipments," which is apparently what occurred here.

On April 29, 1974, the Nederburg arrived in Durban, South Africa, and discharged its cargo, at which time only the eleven cartons could be located for delivery to the consignee—the plaintiff, Elgie & Company. The missing crate containing the generator was never located.

The defendant, South African Marine, had issued an on-board bill of lading for all eleven cartons and the crate which was marked "Received on board March 22, 1974." The bill of lading was endorsed and presented to a bank along with other pertinent documents and payment was made to the seller, Shuron Continental. The issued short-form bill of lading incorporated all the terms and conditions of the carrier's regular long-form bill of lading. The long form extended the application of COGSA to the entire time that the goods were within the possession

and responsibility of the carrier.[4] (This was not, therefore, the common "hook-to-hook" bill of lading in effect from the commencement of loading to unloading.) The dock receipt, which originally called for the shipment of goods aboard the Morgenster, was later changed to indicate that the shipping vessel would be the Nederburg. It was not established when this change was made, by whom, or under what circumstances.

The contract between the defendant ship line and the stevedore called for the latter to furnish terminal

[4] South African Marine Corporation's long-form bill of lading provides, in part:

"1. This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the U.S. 1936, or of the Carriage of Goods by Sea or similar Act in force in any locality where this bill of lading may be issued. All the provisions of such Act are incorporated herein and except as may be specifically provided herein shall govern throughout the entire time that the goods are in the custody of the carrier . . ."

* * * *

"13. In case of any loss or damage to or in connection with goods exceeding in actual value $500. lawful money of the United States, per package, or, in case of goods not shipped in packages per customary freight unit, the value of the goods shall be deemed to be $500. per package or per unit, on which basis the freight is adjusted and the Carrier's liability, if any shall be determined on the basis of a value of $500. per package or per customary freight unit, or pro rata in case of partial loss or damage, unless the nature of the goods and a valuation higher than $500. shall have been declared in writing by the shipper upon delivery to the Carrier and inserted in this bill of lading and extra freight paid if required and in such case if the actual value of the goods per package or per customary freight unit shall exceed such declared value, the value shall nevertheless be deemed to be the declared value and any partial loss or damage shall be adjusted pro rata on the basis of such declared value."

and stevedoring services for South African Marine's vessels. This included the receiving and checking of all cargo destined for the vessels. The plaintiff's goods were in the stevedore's possession from March 13, 1974 until loaded aboard the defendant's vessels. Although the bill of lading indicated that all twelve pieces of cargo had been loaded on board the Nederburg on March 22, 1974, the stevedore's records reveal that only eleven cartons were loaded and this over a three-day period commencing on that date.[5] The dock receipt which had been issued by the stevedore when the shipment in question was delivered also incorporates the terms and provisions of South African Marine's long-form bill of lading, which, in turn, extends the limitations of liability of the ship line to its servants and agents.[6]

[5] On March 13, 1974, I.T.O. received twelve packages from the shipper's truckers, Coty, and signed Dock Receipt No. 207. On March 22, 1974, two packages out of the shipment of twelve were tallied on board the S.A. NEDERBURG by an I.T.O. checker, A. Renna. On March 23, 1974, five more packages out of the shipment of twelve were tallied on board the S.A. NEDERBURG. On March 24, 1974, four more packages were tallied on board the S.A. NEDERBURG by I.T.O. checker, A. Renna.

[6] Paragraph 24 of the long-form bill of lading provides:

"Exemptions and immunities of all servants and agents of the Carrier. It is hereby expressly agreed that no servant or agent of the Carrier (including every independent contractor from time to time employed by the Carrier) shall in any circumstances whatsoever be under any liability whatsoever to the Shipper, Consignee or Owner of the goods or to any Holder of this Bill of Lading for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and, but without prejudice to the generality of the foregoing provisions in this Clause, every exemption, limitation, condition and liberty herein con-

Before turning to the major issue of the applicability of the package limitation clause, two threshold issues are raised by the defendant and third-party defendant. Initially they contend that the plaintiff is not the real party in interest. That is a recurring claim in these cargo damage cases. It appears, however, to have no basis here. The generator's price included the payment of the freight charge. The plaintiff was required to make payment upon the delivery of a clean on-board bill of lading, which it did. The Uniform Commercial Code, § 2-320, makes it clear that title passed from the seller to the plaintiff-buyer upon the delivery of the goods to the ship line and the issuance of a bill of lading and the other required documents. Thereafter, the risk of loss was upon the purchaser. The evidence made it clear that the risk here was borne by the plaintiff, who had to pay the seller for the shipment of the replacement generator.

Next the defendants contend that the plaintiff did not establish the value of the contents of the undelivered crate since it had no direct evidence that it did in fact contain the generator. A bailor makes out a prima facie case merely by showing delivery of the goods to the bailee (here the shipper) and failure

tained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the Carrier acting as aforesaid and for the purpose of all the foregoing provisions of this Clause the Carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by this Bill of Lading."

to return at the required time. *Leather's Best, Inc. v. S.S. Mormaclynx,* 451 F.2d 800, 812 (2d Cir. 1971); *Miles Metal Corporation v. M.S. Havjo,* 494 F.2d 563, 564 (2d Cir. 1974). The plaintiff offered its proof of value through a representative of the selling company who testified, on the basis of his company's records, that the crate contained the generator (nothing else was ever shipped in crates), and the size and description of the crate tallied with the dock receipt issued when the cargo was received by the steamship companies. The value of the generator was established both from the company's records and also from the amount which had to be paid for the shipment of the replacement generator.

It is true, as argued by the defendants, that plaintiff was unable to produce a witness who could testify to the actual packing of the generator in the crate. This is not surprising. Indeed, it would be an unusual case where a witness could be found some years later who could remember the specific packing of one of many items shipped daily by a manufacturing company. That it could not trace the generator itself (as contrasted to the crate it was packed in) through all the various hands it passed does not defeat its claim.

No evidence was offered disputing plaintiff's claim that the missing crate contained the generator. If damage be established in fact, although uncertain in exact amount, recovery for damages is not precluded. *Palmer v. Connecticut Ry. Co.,* 311 U.S. 544, 561 (1941). As the Supreme Court said in *Story Parchment Co. v. Paterson Co.,* 282 U.S. 555, 562 (1931):

> "It is true that there was uncertainty as to the extent of the damage, but there was none as to

> the fact of the damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner has sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount."

The cases cited by the defendants are not in opposition. They all concern goods which arrived in damaged conditions, or partially short, where the burden remained on plaintiff to prove the fact that the damages or the shortages occurred while the goods were in the defendants' possession. For example, *George F. Pettinos, Inc. v. American Export Lines,* 68 F.Supp. 759 (E.D. Pa. 1946), *aff'd,* 159 F.2d 247 (3d Cir. 1947) involved a damaged and short delivery of graphite; *Royston Distributors, Inc. v. Moore-McCormack Lines, Inc.,* 252 F.Supp. 480 (E.D. Pa. 1965), involved uncrated damaged cars; and *Commodity Service Corporation v. Hamburg-American Line,* 354 F.2d 234 (2d Cir. 1965), concerned the spoilage of some of plaintiff's pork products.

The type of proof necessary in those cases differs completely from that necessary to establish value in a non-delivery case. It is undisputed that the plaintiff paid $9,537 for the replacement generator along with additional ocean freight, inland freight and insurance, as well as freight forwarder's charges, for total damages of $10,559.47. It would be both

unrealistic and impractical to expect plaintiff to be able to establish the value of the goods at all points in transit, particularly when the loss occurred within the possession of the defendants.

So the threshold issues raised by the defendants are resolved in favor of the plaintiff; *i.e.,* the plaintiff is a real party in interest and the plaintiff has adequately proved its damages.

This brings us then to a consideration of the package limitation issue. It is perhaps worthwhile to review some of the Second Circuit's decisions during the past few years on that subject. In *Leather's Best, Inc. v. S.S. Mormaclynx, supra,* the loss occurred after cargo was discharged from the vessel and while in the custody of the vessel owner's subsidiary operating a terminal area. (The goods were stolen from the pier after unloading.) The major issue was whether, where ninety-nine bales of leather were placed in a single metal container and then sealed, the vessel's liability should be only $500 for the entire container, as prescribed by the bill of lading, or $500 per bale. The court found the "package" to be each of the ninety-nine bales and held that a limitation of $500 per container set forth in the bill of lading was invalid under COGSA. The court noted, however, that once the container had been unloaded, COGSA and its package limitation no longer applied. However, the court found it inequitable to allow the previously invalid limitation to become revitalized. (Judge Mulligan dissented on this point.)

The terminal operator was not a party to the contract of carriage. It was merely an agent of the shipping line acting within the scope of its authority and, as such, was not liable *ex contractu* for a

breach of the contract between its disclosed principal and the plaintiff. While plaintiff might assert a claim in negligence against the stevedore, it would not be within Federal admiralty jurisdiction. The court did note, in passing, that under New York's law of bailments an agent acting within the scope of his authority is entitled to the benefit of any contractual limits upon the liability of his principal.

In *Miles Metal Corporation v. M.S. Havjo, supra,* the ship owner issued a bill of lading although there was no evidence that the cargo had ever been on board the vessel prior to its departure, nor any indication of delivery to another port. The question then was whether the bill of lading's limitation of liability had any effect. The court refused to treat the bill of lading as *prima facie* evidence of actual loading and viewed it merely as evidence of receipt of the goods by the shipping line. The court noted that:

> "Were the on board bill of lading to be accorded the evidentiary weight that the defendant here claims for it, negligent, if not fraudulent behavior, on the part of carriers would be encouraged. By simply stamping the bill of lading 'on board,' even before the goods had been loaded, the carrier could effectively extend the $500 liability limitation for cargo already on board a ship, 46 U.S.C. § 1304(5), to goods in its possession at dockside." (at 565)

Finally, in *Toyomenka, Inc. v. S.S. Tosahura Maru, supra,* the court considered the question of the stevedore's negligence causing damage and whether it was entitled to the benefit of a limitation on the carrier's liability provided for in the bills of lading. Noting that each case turns on the provisions of the particular bill of lading, the court gave a rather restrictive interpretation to the bill of lading before it:

> "In construing the limitation of liability provision of the bills of lading now before us, as we have done many times before, it is important to bear in mind that we are dealing in a field where recognition of technical precision of language has been the benchmark of our decisions and those of the Supreme Court. Moreover, it must be remembered that the effect of this limitation of liability clause is greatly to reduce the liability of the beneficiary of the clause despite that party's negligence as against a shipper whose goods have been lost or damaged through no fault of his own. In short, in applying strict rules of construction, we do so without blinding ourselves to the equities.
>
> "It is axiomatic that parties to a bill of lading may extend the $500 limitation of liability to third parties. *Herd & Co. v. Krawill Machinery Corp.,* 359 U.S. 297, 302 (1959); *Cabot Corp. v. S.S. Mormacscan,* 441 F.2d 476, 478-79 (2 Cir.), *cert. denied,* 404 U.S. 855 (1971). Such a limitation of common law liability, however, must be clearly expressed. A bill of lading containing such a limitation will be strictly construed against the parties whom it is claimed to benefit. * * * And we have refused to extend such limitation of liability where the bill of lading is ambiguous as to the parties covered.

Rupp v. International Terminal Operating Co., 479 F.2d 674, 676-77 (2 Cir. 1973); *Cabot Corp. v. S.S. Mormacscan, supra,* 441 F.2d at 478.

> "Applying these well established principles, we hold that the bills of lading in the instant case lack the clarity and precision required to permit an extension of limitation of liability to McRoberts." (at 520-521)

The court, however, did not prohibit the inclusion of such provisions in bills of lading as it commented in its final footnote (*Id.*, 552, n.8):

> "Nothing in this decision is intended to preclude parties to a bill of lading from further refining the contract language so as to provide with clarity and precision their intention to extend the limitation of liability to specified third parties. In short, we believe that the problem with which we have dealt in this case can be easily averted in the future by the careful draftsmanship for which the admiralty bar is noted."

See also:

Bernard Screen Printing Corporation v. Meyer Line, 328 F.Supp. 288 (S.D.N.Y. 1971), *aff'd,* 464 F.2d 934 (2d Cir. 1972), *cert. denied,* 410 U.S. 910 (1973); *United States v. The South Star,* 115 F.Supp. 102 (S.D.N.Y. 1953), *aff'd,* 210 F.2d 44 (2d Cir. 1954).

It is apparent that the shipper in this case has attempted to effectively expand the package limitation to cover "the entire time the goods are in the custody of the carrier." Both the issued bill of lading

and the dock receipt incorporate the terms of the long-form bill of lading so expanding the package limitation.

Incorporation of such terms in a short-form bill of lading has been held proper in this circuit. *Encyclopedia Brittanica, Inc. v. S.S. Hong Kong Producer,* 422 F.2d 7 (2d Cir. 1969), *cert. denied,* 397 U.S. 964 (1970). The incorporation of the terms of the bill of lading in the dock receipt has also been accepted. *Eastman Kodak Co. v. S.S. Transmariner,* Docket No. 71 Civ. 304 S.D.N.Y. Nov. 1, 1974, 1975 A.M.C. 123. The purchaser of the subject shipment is also bound by these terms. *Encyclopedia Brittanica, Inc. v. S.S. Hong Kong Producer, supra; Givaudan Delawanna v. The Blijdendijk,* 91 F.Supp. 663 (S.D.N.Y. 1950). Such extensions of limitation are permitted by the Carriage of Goods by Sea Act, 46 U.S.C. § 1307.

Even if the bill of lading is void and ineffective with respect to the crate, the dock receipt would produce the same result of limiting the plaintiff's recovery to $500. This is so because the contract extended the package limitation to cover all periods during which the goods were in custody of the shipper.

Although the evidence was far from conclusive, it would appear that the crate in question was in fact loaded and shipped aboard the S.S. Morgenster on March 15, 1974, as originally intended by the seller's freight forwarder.[7] The carrier's long-form bill of

[7] A tally sheet was put in evidence indicating that one piece was placed on the string piece of the pier on that date and that it had not been removed from that point and, therefore, must have been loaded.

lading allows it to ship a piece on any vessel—there was no requirement that the shipment be made aboard a specific vessel.

The final argument of the plaintiff is that the limitation cannot be applied here because there was fraud or negligence on the part of the shipper which invalidates the bill of lading and negates the effectiveness of the package limitation. Plaintiff relies primarily on the *Havjo* case, but it stands simply for the proposition that a shipper cannot gain the benefit of the package limitation merely by issuing a bill of lading claiming that the goods were on board when, in fact, they were not. While there was undoubtedly negligence on the part of either the shipper or the stevedore (a point to be considered subsequently), there clearly was no fraud. The bill of lading was simply an error and nothing more.

The plaintiff argues, in effect, that the shipper should be estopped from asserting the limitations defense because of its error in issuing an incorrect bill of lading. If the plaintiff's argument were accepted, it would be necessary in every non-delivery case for the shipper to prove that the goods were in fact loaded as per the bill of lading. With the rare exception of goods lost at sea, in non-delivery cases the ultimate disposition of the goods is usually unknown. To nullify the package limitation because the bill of lading may have been erroneous would be to completely change the burden of proof and the relationships between the parties. The *Havjo* case does not require such a result. As this court said in *Eastman Kodak v. Transmariner,* 1975 A.M.C. 123, 126 (S.D.N.Y. 1974):

> "There [*Havjo*] the Court was concerned with and ruled upon an unrelated issue the evidentiary weight to be given an on-board bill of lading offered as the sole proof that the cargo had in fact been placed on board the vessel. Necessarily, therefore, the panel had no occasion to discuss or rule upon the question of the extension of application of COGSA provisions in the absence of an ocean bill of lading.
>
> "In the case at bar, the dock receipt validly extended the application of COGSA in its $500 liability limitation to the entire period that the goods were in the custody of the defendants."

Moreover, the shipper is not relying solely upon the bill of lading as issued, but rather upon its long-form bill of lading and the dock receipt. These documents invoke the limitation at all times while the goods were the shipper's responsibility. The damages, therefore, must be limited to $500.

This leaves only the question of responsibility vis-a-vis the shipper and the stevedore for the loss incurred. As indicated earlier, it would appear that the missing crate was loaded aboard the Morgenster and that the remaining eleven cartons were accidentally left on the pier. On March 22, 1974, a couple of days after the Morgenster had sailed, the stevedores located at least eleven pieces of plaintiff's cargo on the pier.

While the stevedores may be primarily at fault for failure to load all the cargo on the Morgenster, there is a sharp dispute as to who was responsible for the issuance of the erroneous bill of lading since a change in procedures was effected at about that time

concerning the method for notifying the shipper of overlooked cargo not intentionally shut out.[8]

Defendant maintains that it was implicitly notified by the stevedore that none of the twelve packages had gone aboard the Morgenster since the face of the dock receipt did not show a partial shutout. The stevedore concedes the importance of advising the shipper of "split shipments" where there has been a partial shutout and acknowledges that, with substantial amounts of shutout cargo, a pier inventory should have been conducted. It claims it must have notified the shipper by phone of its discovery. The evidence failed to resolve this dispute with any certainty.[9]

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[8] Defendant maintains that it was the then existing procedure for the stevedore to notify it by sending copies of their delivery receipts of all shutout cargo. From the dock receipts received, a list of shutout cargo was then prepared. "Split shipments" (when only part of the cargo was overlooked) were separately listed by the documentation manager by marking the dock receipt accordingly. The stevedore contends that the practice of sending over dock receipts had been abandoned shortly before the time of the shipment in question and it was notifying the ocean carrier of shutout cargo by telephone call.

[9] The stevedore called as a witness its employee responsible for notifying the ocean carrier of situations of this nature. Because of the passage of years he could not recall the specific instance in question, but did testify that, under the circumstances, it would have been his practice to call the defendant and notify one of three employees in its freight department as to what had happened. Defendant did not produce any of these three employees as witnesses, but it is a reasonable assumption that they would have as little present memory as did the stevedore's employee. There is, however, a written notation on the ocean carrier's dock receipt indicating that "Anthony" had advised that he had stowage for eleven pieces. No evidence was offered as to when this notation was made or its purpose. It does, however, support the stevedore's contention that it gave a notification, albeit somewhat late, of the fact that it held eleven pieces of plaintiff's cargo (and not twelve).

This dispute concerning the method of notification then used may not be crucial. These procedures were employed immediately after the sailing of the vessel in question. Since plaintiff's remaining cargo was not located until some days later, the routine method might not have been applicable. This, of course, does not excuse the failure to prepare accurate bills of lading. While the preparation of a split-shipment dock receipt may have been impossible because of lack of time, bills of lading are not released until after the vessel sails and time pressure is minimal.

Although it would appear that the missing freight did go forward on the S.S. Morgenster, no attempt was made by the shipper to account for the unloading or to establish that the missing crate was not in fact aboard the Morgenster. The stevedore argues that, even if it was responsible for the error made in the bill of lading, it was not responsible for the loss of the crate which had in fact gone forward to the right port on the very vessel originally intended. As bailees of the cargo, the stevedore contends that the burden was on the ocean carrier to explain its ultimate loss, citing *David Crystal, Inc. v. Cunard Steam-Ship Co.,* 339 F.2d 295 (2d Cir. 1964), *cert. denied,* 380 U.S. 976 (1965).

The contract between the ocean carrier and the stevedore limited the stevedore's liability to physical damage and fraud.[10] Defendant argues, however, that

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[10] Section 5 of the contract provides:

"With respect to claims for loss or damage to cargo and/or baggage, the liability of the Contractor shall be limited to the physical damage caused by the negligence of the Contractor and to such claims that result from fraud on the part of the employees of the contractor engaged in the delivery, receiving and watching of cargo . . ."

the failure to account for the cargo constitutes a breach of an implied warranty of workmanlike services, citing *Stein Hall & Co., Inc. v. S.S. Concordia Viking,* 494 F.2d 287, 290 (2d Cir. 1974). It has been held in this Circuit that a warranty of workmanlike service will be implied in maritime service contracts. *Fairmont Ship. Corp. v. Chevron Internat'l Oil Co., Inc.,* 511 F.2d 1252 (2d Cir. 1975), *cert. denied,* 423 U.S. 838 (1975). The stevedore points to ¶18 of its contract which provides:

> "Entire agreement: This contract constitutes the full agreement between the parties hereto and no warranty of any nature shall be implied from any of the wording of this agreement."

The ocean carrier responds that this is inadequate to dispel the existence of an implied warranty, and that only an express disclaimer will suffice citing *Pettus v. Grace Line, Inc.,* 305 F.2d 151 (2d Cir. 1962).

In the final analysis, we must conclude that both the ocean carrier and the stevedore were, to some degree, negligent and responsible for the issuance of the erroneous bill of lading. However, the burden of proof is on the ocean carrier to show that the stevedore breached its contract. *See* 17A C.J.S. Contracts §578. Moreover, since the terms of their contract limited the liability of the stevedore to fraud or negligence which causes the cargo loss, and since the ultimate loss was not due to the issuance of the erroneous bill of lading, it would appear that the ocean carrier has not met its burden of proving that the stevedore's negligence was the proximate cause of the loss. *Saugerties Bank v. Belaware & Hudson Co.,* 236 N.Y. 425 (1923). In any event, since the defendant

and third-party defendants were concurrently negligent, the claim for indemnity is barred. *Amerocean Steamship Company v. Copp,* 245 F.2d 291 (9th Cir. 1957), *McFall v. Compagnie Maritime Belge,* 1952 A.M.C. 1860, 304 N.Y. 314 (1952).

This leaves only the question of counsel fees as between the defendant and third-party defendant. It is well established that the allowance of counsel fees is within the discretion of the court. *Rogers v. United States Lines Company,* 303 F.2d 295, 299 (3d Cir. 1962). Since we conclude that each party's negligence contributed to the defendant's liability, it would be inappropriate to give either attorney's fees under these circumstances.[11] *Toyomenka, Inc. v. S.S. Tosaharu Maru,* 392 F.Supp. 450, 454 (S.D.N.Y. 1974), *reversed* on other grounds, 523 F.2d 518 (2d Cir. 1975).

In conclusion, therefore, the plaintiff is entitled to recovery against the defendant but its recovery, pursuant to the contract of carriage, is limited to $500. The defendant is not entitled to indemnity or attorney's fees from the third-party defendant. Judgment shall be entered accordingly.

SO ORDERED:

Dated: New York, N.Y.,
September 9, 1976.

GERALD L. GOETELL
U.S. District Judge

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[11] The defendant did not tender the admitted liability of $500 to the plaintiff. The third-party defendant did make such a tender to both the defendant and the plaintiff on November 12, 1975, as part of an offer of judgment pursuant to Rule 68, F.R.Civ.P. (Neither party accepted this offer.)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

June 20, 1978

Nos. 76-7510 and 76-7562

ELGIE & COMPANY,

Plaintiff-Appellant,

—v.—

S.S. "S.A. NEDERBURG", HER ENGINES, ETC., AND SOUTH AFRICAN MARINE CORPORATION, LTD.,

Defendant-Appellee and Third-Party Plaintiff-Appellant,

—v.—

INTERNATIONAL TERMINAL OPERATING COMPANY, INC.,

Third-Party Defendant-Appellee.

Before:

FEINBERG, WATERMAN, and SMITH, Ct. JJ.

The issue of the applicability of Sec. 22 of the Pomerene Act having been raised *sua sponte* by Second Circuit on appeal, case will be remanded for D.C.'s determination whether (a) plaintiff relied on alleged misdescription in ocean carrier's B/L, and (b) plaintiff's damages were caused by such misdescription.

John T. Kochendorfer (Bigham, Englar Jones & Houston), *for Plaintiff-Appellant.*

M. E. DeOrchis (Haight, Gardner, Poor & Havens) *for Defendant-Appellee.*

Robert E. Daley (Hill, Rivkins, Carey, Loesberg & O'Brien), *for Third-Party Defendant-Appellee.*

Appeal from the United States District Court for the Southern District of New York, Gerard L. Goettel, D.J., 1976 AMC 2446 and 1978 AMC 2189. Remanded.

PER CURIAM:

Elgie & Company appeals from a decision of Judge Gerald L. Goettel in the United States District Court for the Southern District of New York, limiting appellant's recovery against the steamship S.S. *S.A. Nederburg* and the ocean freight carrier South African Marine Corp., Ltd. for a lost crate to the $500 limitation created by the Carriage of Goods By Sea Act ("COGSA"), 46 U.S. Code, sec. 1304(5). The crate contained an optical grinding machine worth in excess of $10,000. 1976 AMC 2446. South African Marine impleaded the stevedore, International Terminal Operating Co., Inc. ("I.T.O."), and appeals from the portion of the district court opinion that denied its third party claim for indemnity from I.T.O.

This Court *sua sponte* raised the issue whether the Pomerene Bills of Lading Act ("the Act"), 49 U.S. Code, secs. 81 *et seq.*, was applicable to the circumstances of this case. The parties' letter briefs in reply reflect the substantiality of the Court's query, and we now remand to the district court for an initial

determination of the heretofore unaddressed factual and legal issues involved. Specifically, the district court should determine whether section 22 of the Act, 49 U.S. Code, sec. 102, applies here, and if it does, whether recovery under that section is affected by the $500 per package COGSA limitation. The applicability of the Act may well depend upon (a) whether Elgie *relied* upon an alleged misdescription of the goods in the bill of lading issued by South African Marine, and (b) whether the damages suffered by appellant were *caused* by such misdescription. Since these questions cannot be readily resolved by an appellate court, a remand for specific findings is needed. See *Pacific Micronesian Lines, Inc. v. New Zealand Insurance Co.,* 1966 AMC 2376, 366 F.2d 333 (9 Cir., 1966), *aff'd on remand,* 1969 AMC 207, 397 F.2d 236 (9 Cir., 1968). Upon remand, the district court is not required to take further evidence on these or any other points, but may do so if it sees fit.

We also remand for a specific finding, preferably based on more substantial evidence than an unsigned tally (should it exist), on whether the missing crate was actually loaded upon the *Morgenster.* It is unclear if the district court's statement that "one large crate was probably loaded upon the *Morgenster*" constitutes a factual finding of the court.

The case is remanded to the district court for further proceedings in accordance with this order. Any appeal from a subsequent order of the district court after remand, shall, if practicable, be referred to this panel.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

August 30, 1978

74 Civ. 5112 (GLG)

ELGIE & COMPANY,

Plaintiff,

—against—

S. S. "S.A. NEDERBURG", her engines, boilers, etc., and SOUTH AFRICAN MARINE CORPORATION, LTD.,

Defendant and Third-Party Plaintiffs,

—against—

INTERNATIONAL TERMINAL OPERATING COMPANY, INC.,

Third-Party Defendant.

OPINION

Appearances:

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Of Counsel

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By: Robert E. Daley, Esq.
Of Counsel

GERARD L. GOETTEL, D.J.:

More than two years after the trial of this action, the Court of Appeals has remanded for consideration of a legal issue not raised before the trial or appellate court or recognized by the parties until the Court of Appeals requested its briefing. The order of remand requires this Court to determine whether Section 22 of the Pomerene Act, 49 U.S. Code, sec. 102, "applies here" and, if it does, whether the $500 per package limitation of liability permitted by the Carriage of Goods by Sea Act (COGSA), 46 U.S. Code, sec. 1304(5) should nevertheless limit the damages recoverable. In the opinion of the remanding panel, the applicability of Section 22 of the Pomerene Act

> "may well depend upon (a) whether Elgie relied upon an alleged misdescription of the goods in the bill of lading issued by South African Marine, and (b) whether the damages suffered by appellant were *caused* by such misdescription." (emphasis in original)

The action was also remanded for more specific factual findings, a point which will be discussed in greater detail hereafter 1978 AMC 2188.

While the remand order indicated that the applicability of the Pomerene Act might turn on factual issues, the order did not compel the taking of evidence. This Court invited the three parties to present any relevant additional evidence but all have declined that opportunity and indicated no desire to brief the matter further, resting instead upon their letter submissions to the Court of Appeals.

Section 22 of the Pomerene Act, 46 U.S. Code, sec. 102, reads in pertinent part:

> "Liability for nonreceipt or misdescription of goods
>
> "If a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading therefor for transportation in commerce among the several States and with foreign nations, the carrier shall be liable to * * * (b) the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods * * * for damages caused by the nonreceipt by the carrier of all or part of the goods upon or prior to the date therein shown, or their failure to correspond with the description thereof in the bill at the time of its issue."

The Carriage of Goods by Sea Act (COGSA) 46 U.S. Code, sec. 1301, *et seq.*, did not repeal the Pomerene Act passed twenty years earlier, so that

the latter continues to have some application to ocean bills of lading. 46 U.S. Code, sec. 1303(4); G. Gilmore & C. Black, *The Law of Admiralty* 95 (1975). Section 22 of the Pomerene Act was enacted to correct a prevalent abuse of the time involving the issuance of fraudulent bills of lading by carrier's agents acting in conspiracy with shippers. The agent, often appropriating the goods for himself, would issue the bill of lading even though no goods were received. A. Knauth, *The American Law of Ocean Bills of Lading* 388-94 (4th ed., 1953). When sued by an innocent holder of the bill, carriers were permitted to escape liability under a rule which held that the agent lacked authority to issue a fraudulent bill of lading and its provisions were, therefore, not binding on the carrier. *Friedlander v. Texas & Pacific Railroad,* 130 U.S. 416 (1889). Section 22 operates to eliminate this defense by expanding the agent's implied authority. *Gleason v. Seaboard Air Line Railway Co.,* 278 U.S. 349 (1929). The carrier may assert a defense based on its initial non-receipt of or misdescription to it of the goods only against an individual who had not given value or relied upon the bill of lading. *Strohmeyer Arpe Co. v. American Line S.S. Corp.,* 1938 AMC 875, 97 F.2d 360 (2 Cir., 1938); *Pacific Micronesian Lines, Inc. v. New Zealand Insurance Co.,* 1966 AMC 2376, 366 F.2d 333, 336 (9 Cir., 1966).

The statute by its terms appears to address two different situations where the holder of a bill of lading relies on the recitals contained in it. The first is the failure to receive the goods due to their initial non-receipt by the carrier. The second is the failure to receive the type of goods expected due to their misdescription in the bill of lading.

This case involves lost goods, but there is no dispute that they were lost *after* their initial receipt by the defendant carrier so that the first situation is not involved. Since the goods were not delivered, rather than a delivery at variance with their description, the facts do not fit the second category either. The remand order, however, appears to assume that a third situation could exist—damages somehow "caused" by their "misdescription" in the bill of lading.

Looking first to see if there was a "misdescription," the bill of lading accurately describes the goods as eleven cartons and one crate. The Act, of course, does not speak of "misdescription" but deals rather with the goods' "failure to correspond with the description" in the bill. The inaccurate statement that all the cargo was shipped on the S S. *Nederburg* does not misdescribe the goods, but rather their presence aboard the vessel. Section 22, by its terms, applies only to a failure to correspond with the description of the goods (which implies the delivery of something else) not to *any* inaccuracy carried on the face of the bill of lading.

The issue becomes clearer once the element of causation is considered. Where the loss of goods stems from their initial non-receipt by the carrier, the holder of the bill of lading can establish reliance and causation simply by demonstrating that payment was required in advance under the terms of the bill of lading. *Pacific Micronesian Lines, Inc. v. New Zealand Insurance Co.,* 1969 AMC 207, 397 F.2d 236 (9 Cir., 1968) (decision following remand). This follows because the holder's non-receipt of the goods was undoubtedly due to the carrier's failure to receive the

goods prior to its issuance of a bill of lading. While the issuance of a bill of lading indicating that all of the goods had gone forward on the same vessel may have induced plaintiff to make full payment, its damages were caused by an erroneous representation and not by a "failure to correspond with description." A reasonable construction of Section 22 would limit "misdescription" claims to cases where the goods received vary from those described in the bill of lading and not create liability under Section 22 for a simple nondelivery.

However, even if the scope of Section 22 were expanded to create liability for all negligently made inaccuracies relating to the description of the goods, there would be little justification for not allowing the carrier to take advantage of the limitation of liability permitted by COGSA, 46 U.S. Code, sec. 1304(5) and included in this bill of lading.

As noted in the original opinion of the Court, it has been a common occurrence for cargo to be nondelivered with no explanation as to where it went. The bill of lading and the dock receipt extended the COGSA limitation to the entire period the goods were in the custody of the carrier. Presumably, the parties governed their conduct with the expectation that these provisions would control. If the package limitation of COGSA is inapplicable because of the Pomerene Act in a negligent loss of cargo case, the burden of proof and the relationships among the parties to these maritime commercial transactions would be dramatically altered some 62 years after the Pomerene Act was first passed. The Act's scope was not intended to be so great since its purpose lay in curbing deliberate fraud. See A. Knauth, *The American*

Law of Ocean Bills of Lading, 388-94 (4th ed., 1953). If we are to have such an abrupt shifting of the risk, it should come by legislation not judicial interpretation.

The case was also remanded

> "for a specific finding, preferably based on more substantial evidence than an unsigned tally (should it exist), on whether the missing crate was actually loaded upon the *Morgenster.* It is unclear if the district court's statement that 'one large crate was probably loaded upon the *Morgenster*' constitutes a factual finding of the court."

Implicit in the remand is the notion that there must have been better evidence than the unsigned tally on which to base a finding that the crate was shipped on the *Morgenster.* As this Court's original opinion noted, the tally is a disappointing bit of evidence. In addition to being unsigned, it is also somewhat illegible. Besides indicating that one item from dock receipt 207 was loaded on the *Morgenster,* it contains the notation "parts." It is possible that this word is a continuation of a previous line which is somewhat illegible. If it refers to the crate, it is an obvious inaccuracy. With all of its faults, however, this was the only basic evidence on the question. Throughout the trial, and after invitations from both the Court of Appeals and this Court, the parties have been unable to produce any more probative evidence on the issue.

While this is a source of frustration, apparently the parties did not keep records with the possibility of litigation in mind. As the original opinion of this Court noted, the absence of adequate records was

caused in great part by a change in the procedures used by the stevedores in notifying the shipping line of failures to load ("shut outs") and, in particular, "split shipments." Without such notice, the shipping line could not take precautions against the loss of the goods and, therefore, the sloppy records, upon which the case now turns, apparently caused the loss in the beginning.

Explicit in the order of remand was the panel's uncertainty as to whether this Court's tentative conclusion that the crate was shipped aboard the *Morgenster* was a finding of fact. In the technical sense of being necessary to support the decision below it was not. Because the COGSA limitation was viewed as covering the entire time the goods were in the custody of the shipper, pinpointing the exact time or manner of loss was not deemed important.

Although seeing no need for the making of the factual determination, it is the conclusion of this Court, on the evidence presented, that the missing crate containing the generator was loaded upon the *Morgenster*. This finding is based upon the following facts:

1. The crate, along with the other parts, was delivered to the pier on March 13, 1974, and was receipted for under dock receipt 207. (See footnote 5, original opinion.)

2. The crate was too large to be pilfered.

3. The crate was of such a unique and limited use (the grinding of optical curves) that it is unlikely that anyone would have contrived to have it stolen using a large vehicle.

4. The crate was sufficiently large that, if it had been accidentally dropped overboard during loading, this would have been noted and remembered.

5. In addition to the tally sheet indication that one package from the shipment was loaded on the *Morgenster,* the testimony of the checker was that he had no question in his mind that the piece had gone aboard the *Morgenster.*

6. A written notation on the ocean carrier's dock receipt indicated that "Anthony" had advised that he then had stowage for only eleven pieces. (See footnote 9 of the Court's original opinion.)

7. The stevedore's records revealed that only eleven cartons were loaded aboard the *S.A. Nederburg.* (See footnote 5 original opinion.)

Consequently, since the missing crate left the pier during the ten-day period in the middle of March, during which the *Morgenster* sailed, and since there is some evidence that a piece went aboard the *Morgenster* on March 15, 1974, and there is no other reasonable explanation for where it went, the Court finds that it was loaded and went forward on the *Morgenster.*

SO ORDERED:

Dated: New York, N.Y.,
August 30, 1978.

GERALD L. GOETELL
U.S. District Judge

APPENDIX B

Opinion of the Circuit Court

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 379 and 643—August Term, 1978.

(Argued January 19, 1979 Decided June 11, 1979.)

Docket Nos. 76-7510, 76-7562

ELGIE & COMPANY,

Plaintiff-Appellant,

—v.—

S.S. "S.A. NEDERBURG", her engines, boilers, etc., and SOUTH AFRICAN MARINE CORPORATION, LTD.,

Defendant-Appellee and Third-Party Plaintiff-Appellant,

—v.—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant-Appellee.

Before:

WATERMAN, FEINBERG, and VAN GRAAFEILAND,
Circuit Judges.

Appeals from a judgment order of the United States District Court for the Southern District of New York, Goettel, *J.*, which order: (1) adjudged defendant ocean

carrier liable to plaintiff holder of bill of lading for damages resulting from the unexplained loss of cargo but which limited recovery to $500 by applying the United States Carriage of Goods by Sea Act package limitation and (2) which denied claim of ocean carrier, as third-party plaintiff, for indemnity from third-party defendant stevedore. Plaintiff holder appeals from judgment order insofar as that order limited holder's recovery to $500. Ocean carrier, as third-party plaintiff, appeals from so much of the judgment order as denied its claim for indemnity from third-party defendant stevedore.

To the extent that it limited plaintiff holder's recovery against defendant ocean carrier to $500, judgment order reversed and case remanded with directions that judgment be entered in plaintiff holder's favor for the full value of the lost cargo; in all other respects, judgment order affirmed.

JOHN T. KOCHENDORFER, New York, N.Y. (Bigham, Englar, Jones & Houston, New York, N.Y., of Counsel), *for Plaintiff-Appellant.*

M. E. DEORCHIS, New York, N.Y. (Haight, Gardner, Poor & Havens, New York, N.Y.; Brian D. Starer and Nicholas H. Cobbs, of Counsel), *for Defendant-Appellee-Appellant.*

ROBERT E. DALEY, New York, N.Y. (Hill, Rivkins, Carey, Loesberg & O'Brien, New York, N.Y.), *for Third-Party Defendant-Appellee.*

VAN GRAAFEILAND, *Circuit Judge:*

On March 24, 1974, the S.A. Nederburg, owned and operated by South African Marine Corporation, Ltd., sailed from New York City bound for South Africa. Several days later, South African issued an on-board, order bill of lading indicating that the Nederburg was carrying eleven cartons and one crate of optical machinery and accessories for discharge at Durban, South Africa. The equipment had been sold by the consignor, Shuron Continental, an American manufacturer, to plaintiff, Elgie, a Durban company, and payment was to be made pursuant to a draft against an irrevocable letter of credit established in Shuron's favor by Barclays Bank D.C.O. for Elgie's account. The letter of credit required that the draft be accompanied by a full set of clean on-board bills of lading marked "freight prepaid". On April 16, 1974, Shuron presented its draft, together with South African's bill of lading and other pertinent documents, to Barclays and received payment.

It is now conceded by all parties that the crate, which contained a lens grinding machine, was never aboard the Nederburg. In fact, the crate has simply disappeared. Elgie instituted suit against South African in the Southern District of New York and established that its total damages resulting from the non-delivery were $10,559.47. However, South African's bill of lading[1] contained the $500 per package limitation of liability clause permitted by section 4(5) of COGSA (46 U.S.C. § 1304 (5)), and the judgment appealed from limited plaintiff's recovery to that amount. The judgment also denied recovery over by South African against International Terminal

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1 Although South African's bill of lading was a Short Form Bill, it incorporated by reference the carrier's regular form which contained the limitation of liability clause.

Operating Co., Inc. (ITO), the terminal company which received the shipment and undertook to load it. Plaintiff appeals from that portion of the judgment limiting its recovery to $500. Defendant appeals from the judgment in plaintiff's favor and the dismissal of its third-party complaint against ITO.

The appeal has been argued twice. After the first argument, this Court *sua sponte* raised the question whether section 22 of the Pomerene Bills of Lading Act (49 U.S.C. § 102) applied to the circumstances of this case and, if so, whether the plaintiff should recover the full amount of its damages, rather than $500.[2] We remanded to the district court for further factual findings and a determination of the legal issues thus raised. On remand, none of the parties offered any additional testimony, although given the opportunity to do so. The district judge found, nonetheless, that the missing crate had been loaded on the S.S. Morgenster, another of defendant's ships, which had sailed for Durban from New York on March 16, 1974.[3] He also concluded once again that plaintiff's recovery must be limited to $500. This determination was

2 Section 22 was not repealed by COGSA. *See* 46 U.S.C. § 1303(4). So far as pertinent, § 22 provides that if a bill of lading has been issued by the carrier, the carrier shall be liable to "the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, or upon the shipment being made upon the date therein shown, for damages caused by the nonreceipt by the carrier of all or part of the goods upon or prior to the date therein shown, or their failure to correspond with the description thereof in the bill at the time of its issue."

3 The entire shipment was originally booked to go aboard the Morgenster. South African asserts, however, that ITO informed it the shipment had been shut out from the Morgenster and loaded on the Nederburg. Accordingly, the bill of lading delivered to the consignor and negotiated to plaintiff represented that the crate was aboard the Nederburg.

not based upon the aforementioned factual finding, however, but upon the district judge's interpretation of section 22.

The district judge interpreted the term "description", as used in section 22, to cover only the character or nature of the goods referred to in the bill of lading, not their quantity. He concluded, therefore, that the bill of lading's reference to eleven cartons and one crate was not a misdescription of the goods. He held further that, if section 22 were construed to cover misstatements as to quantity, the $500 limitation would nonetheless be applicable, because section 22 of the Pomerene Act was intended only to curb deliberate fraud. Our examination of that section in its historical context convinces us that the able district judge misconstrued it.

In 1916, when Pomerene was enacted, there was already a substantial body of law holding carriers liable to consignees and good faith assignees for value for misrepresentations in their bills of lading. *See The Carso,* 43 F.2d 736 (S.D.N.Y. 1930), aff'd in part and rev'd in part, 53 F.2d 374 (2d Cir. 1931). However, federal courts limited the application of this rule by holding that a carrier's agent issuing a bill of lading had no implied authority to represent that goods had been received when actually they had not. *See Friedlander v. Texas & P. Ry.,* 130 U.S. 416 (1889). New York law was to the contrary, *see, e.g., Bank of Batavia v. New York L.E. and W.R.R.,* 106 N.Y. 195 (1887), and section 22 was enacted for the purpose of adopting a rule like that of New York. *Gleason v. Seaboard Air Line Ry.,* 278 U.S. 349, 354-55 (1929); *Josephy v. Panhandle and S.F. Ry.,* 235 N.Y. 306, 310 (1923). With this purpose in mind, Congress could not have intended the term "description" in section 22 to apply only to the nature of the goods being shipped. Indeed,

Congress' expressed intent was to plug the "loophole" represented by the *Friedlander* line of authorities by providing that a "carrier shall be liable for goods receipted for by its representatives even though they may not actually have been received." *See* S. Rep. 742, 74th Cong. 1st Sess. (1935).

An examination of section 22 as it was originally enacted makes it quite clear that this was the congressional intent. The original statute made no reference to the date of shipment. It provided that the carrier would be liable to "the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, for damages caused by the nonreceipt by the carrier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue." *See* 39 Stat. 542 (1916). The only reasonable construction that can be placed upon this language is that "description" of goods includes the quantity involved.[4]

On shipments originating outside the United States and thus not covered by the Pomerene Act, a carrier is bound by its representations concerning on-board quantities. *General Foods Corp. v. The Felipe Camarao,* 172 F.2d 131, 133 (2d Cir.), *cert. denied* 337 U.S. 908 (1949); *A.L. Holden v. S.S. Kendall Fish,* 212 F. Supp. 106, 110 (E.D. La. 1962); *Insurance Company of North America v. The S.S. Exminster,* 127 F. Supp. 541, 542 (S.D.N.Y. 1954).[5]

4 The 1927 amendment of section 22, 44 Stat. 1450, which inserted the provisions relating to the date of shipment, made the date also a part of the description of the goods. *Toho Bussan Kaisha, Ltd. v. American President Lines, Ltd.,* 155 F. Supp. 886, 890-91 (S.D.N.Y. 1957), *aff'd,* 265 F.2d 418 (2d Cir. 1959).

5 The carrier is also bound by representations as to the condition of its lading or its method of stowage. *Demsey & Associates, Inc. v. S.S. Sea Star,* 461 F.2d 1009, 1015 (2d Cir. 1972); *Baltic Cotton Co. v. United States,* 55 F.2d 568, 569 (5th Cir. 1932); *Dupont DeNemours International S.A. v. S.S. Mormacvega,* 312 F. Supp. 322 (S.D.N.Y. 1970).

Congress could not have intended to impose a lesser standard of care by the enactment of section 22. *See Portland Fish Co. v. States Steamship Co.,* 510 F.2d 628, 631-32 (9th Cir. 1974); *Pacific Micronesian Line, Inc. v. New Zealand Insurance Co.,* 397 F.2d 236, 237 (9th Cir. 1968). It follows that defendant did not accurately describe the shipment of eleven cartons by calling it eleven cartons and a crate and that it misrepresented the shipment in so doing. *Plata American Trading, Inc. v. Lancashire,* 29 Misc. 2d 246, 250 (1957), *aff'd,* 6 App. Div. 2d 1036 (1958), *leave to appeal denied,* 7 App. Div. 2d 838 (1959).

Contrary to the finding of the district court, there is no indication that Congress intended civil liability to flow from fraudulent misrepresentations only. *Cf.* 49 U.S.C. § 121 dealing with criminal liability. Section 20 of the Pomerene Act (49 U.S.C. § 100) provides in part that when packaged goods are loaded by a carrier, the carrier shall count the packages. A fair implication of this is that the carrier must state in the bill of lading the number of packages so counted. *Leigh Ellis & Co. v. Payne,* 274 F. 443, 446 (N.D. Ga.), *aff'd on other grounds,* 276 F. 400 (5th Cir. 1921), *aff'd,* 260 U.S. 682 (1923); Knauth, *Ocean Bills of Lading* 405-06 (1953). Section 22 does not require that a misstatement of that count be fraudulent or intentional in order that liability ensue. This is the common law rule. *See General Foods Corp. v. The Felipe Camarao, supra,* 172 F.2d 131; *Bradstreet v. Heran,* 2 Blatchf. 116, 3 Fed. Cas. 1183, No. 1792a (1849); *Fleck & Hillman v. Wabash Ry.,* 200 App. Div. 482, *leave to appeal denied,* 202 App. Div. 741 (1922); *Campania Naviera Vasconzada v. Churchill & Sim,* 1 K.B. 237, 248 (1906). The Pomerene Act, which was designed to improve the negotiability of bills of lading, did not impose a lesser obligation on issuing carriers. *See Chicago & N.W.*

Ry. v. Stephens Nat. Bank 75 F.2d 398, 401 (8th Cir.), *cert. denied,* 295 U.S. 738 (1935); *Chicago & N.W. Ry. v. Bewsher,* 6 F.2d 947, 953 (8th Cir. 1925), *cert. denied,* 270 U.S. 641 (1926); *Leigh Ellis & Co. v. Payne, supra,* 274 F. at 446.[6]

There can be no question that plaintiff gave value in good faith relying upon defendant's bill of lading. Defendant conceded plaintiff's status as a holder in due course in its answer to plaintiff's interrogatories. Freight for the missing crate was prepaid by the consignor which was reimbursed by plaintiff. The draft by which payment of the freight and purchase price was secured had to be accompanied by a clean bill of lading, and payment was made because defendant's bill was clean. *See General Foods Corporation v. The Felipe Camarao, supra,* 172 F.2d at 132; *Olivier Straw Goods Corp. v. Osaka Shosen Kaisha,* 27 F.2d 129, 133 (2d Cir.) *cert. denied,* 278 U.S. 61 (1928); Knauth, *supra,* at 405-06. Plaintiff's proof established, therefore, its right of recovery under section 22.

We conclude also that plaintiff was entitled to recover the full amount of its damages. The Pomerene Act contains no limitation of liability provisions similar to section

6 Liability to good faith transferees for value for misstatements in a bill of lading has generally been based on the doctrine of estoppel. *Portland Fish Co. v. States Steamship Co., supra,* 510 F.2d at 631; *Olivier Straw Goods Corp. v. Osaka Shosen Kaisha, supra,* 27 F.2d at 133. Equitable principles play an important role in the law of admiralty, *Demsey & Associates, Inc. v. S.S. Sea Star,* 500 F.2d 409, 411 (2d Cir. 1974), and the better rule has long been that equitable estoppel can come into being without intentional misrepresentation. *See Leather Manufacturers' Bank v. Morgan,* 117 U.S. 96, 108 (1886); *Columbia Broadcasting System, Inc. v. Stokely-Vancamp, Inc.,* 522 F.2d 369, 378-79 (2d Cir. 1975); 12 *Williston on Contracts* § 1508 (3d ed. 1970). It is unlikely that, when Congress codified the estoppel principle in § 22, *see Portland Fish Co. v. States Steamship Co., supra,* 510 F.2d at 631, it intended to change its traditional meaning.

4(5) of COGSA. Section 22 provides that a holder in good faith for value of an order bill is entitled to recover its "damages". This means "any damage he may have sustained." *Toho Bussan Kaisha Ltd. v. American President Lines, supra,* 155 F. Supp. at 891. Because COGSA specifically provides that none of its provisions shall be construed as repealing or limiting any of Pomerene's, it would seem that the right of full recovery provided for in section 22 survived the enactment of COGSA.

This interpretation is supported by established doctrines of admiralty law. In *Oliver II,* 47 F.2d 878, 879 (2d Cir.), *cert. denied,* 283 U.S. 856 (1931), this court held a statement in a bill of lading that goods were on board to be a warranty whose breach prevented the carrier from invoking limitation of liability clauses against a good faith purchaser of the bill. We likened the carrier's misstatement to a substantial deviation in voyage or stowage which would also nullify valuation clauses. *Id.* at 880; *see Insurance Company of North America v. The S.S. Exminster, supra,* 127 F. Supp. at 542. We continue to recognize the doctrine of quasi-deviation, *see Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer,* 422 F.2d 7, 18 (2d Cir. 1969), *cert. denied,* 397 U.S. 964 (1970), although we are disinclined to extend it. *See Iligan Integrated Steel Mills, Inc. v. S.S. John Weyerhaeuser,* 507 F.2d 68, 71-72 (2d Cir. 1974), *cert. denied,* 421 U.S. 965 (1975). In allowing plaintiff full recovery herein, we are not extending the principles enunciated in *Olivier.* In view of the underlying purpose of section 22, we do not feel compelled to reject them.

The presence on board of goods for which an on-board bill of lading has been issued is of significant importance to transferees for value of the bill. *See* 10 *Williston on Contracts* §§ 1079-80 (3d ed. 1967); *Uniform Customs and*

Practice for Documentary Credits, Art. 18, *reprinted in id.* at 101. We are not persuaded by defendant's argument that it has satisfied its obligation to plaintiff so long as the crate was somewhere in its possession. *See Miles Metal Corp. v. M.S. Havjo,* 494 F.2d 563, 565 (1974). Plaintiff did not make payment on the basis of a dock receipt or a "received for payment" bill of lading. *See Olivier, supra,* 27 F.2d at 133.[7] Moreover, we are not dealing here with shut-out cargo that was delivered safely on another ship, *cf. The Baltic,* 212 F. 759 (S.D.N.Y. 1914), but with cargo already misplaced when the bill of lading was issued and never subsequently delivered. *Cf. General Foods Corp. v. The Felipe Camarao, supra,* 172 F.2d 131. Defendant's original position was that the missing crate had not been loaded on the Morgenster. Adjusting their sails to the prevailing wind, defendant's attorneys now support ITO's contention that it was so loaded. However, they continue to insist that this was done without South African's knowledge. Unquestionably, if the crate left New York on the Morgenster, it did so without covering shipping documentation. If the "on-board" designation in a bill of lading is to have any meaning to a holder in due course, its use in the instant case must be treated as a misdescription under section 22.

Limitation of the carrier's liability under the circumstances of this case would run counter to the intent of Congress, which was to encourage the negotiation of bills of lading. We conclude, therefore, that plaintiff is entitled to full recovery.

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7 The district court's assertion that the parties must have conducted themselves with the expectation that the limitation of liability provisions would control was a boot-strap argument which assumed the answer to the question the court was considering.

THE LIABILITY OVER

In its third party complaint against ITO, South African alleged that if the crate was lost, the loss occurred when it was in the custody of ITO and was caused by the fault and neglect of ITO in violation of its warranty to perform its services in a workmanlike manner. The district court found, however, that ITO had loaded the crate on the Morgenster, and the dispute between South African and ITO now centers on whether South African was misinformed as to the location of the loaded crate.

South African's witnesses testified that, when a shipment is shut out, South African receives in a separate "shut-out" envelope a copy of ITO's dock receipt covering that shipment. If no breakdown is shown on the receipt, it means that the entire shipment has been shut out. If the shut-out is partial, this will be indicated on the receipt. South African's documentation manager testified that after the Morgenster had sailed, he received a dock receipt from ITO indicating that the entire shipment had been shut out. He then prepared a list, Exhibit G in evidence, indicating that the entire shipment was to go forward on the Nederburg, and the bill of lading was changed to so indicate.

ITO's witnesses testified, on the other hand, that none of the shipment was shut out from the Morgenster and that the eleven cartons were left behind accidentally. For this reason, ITO sent South African no shut-out documents covering the Shuron shipment. However, testimony was received without objection that it was customary for ITO to notify South African if cargo was inadvertently left behind.

The district judge found that both South African and ITO were to some degree negligent and responsible for the issuance of the erroneous bill of lading. However,

Elgie did not sue South African for negligence, and South African is seeking indemnification for breach of warranty, not contribution from a joint tort feasor. *See Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc.,* 417 U.S. 106, 114-15 (1973); *Italia Societa Per Azioni Di Navigazione v. Oregon Stevedoring Co., Inc.,* 376 U.S. 315, 321 (1963). The merit of its claim must therefore be determined by reference to the terms of its contract.

The relationship between South African and ITO was governed by a written contract which required ITO to provide wharfage for South African's cargoes and to stevedore its ships. The contract provided that ITO would be liable for loss of cargo "overside" through its negligence and that, with respect to claims for loss of cargo, ITO's liability would be limited "to such claims that result from fraud on the part of employees of [ITO] engaged in the delivery, receiving and watching of cargo." The contract provided further that it constituted the full agreement between the parties and that "no warranty of any nature shall be implied from any of the wording of this agreement."

It is readily apparent that South African has permitted ITO to greatly limit its liability under the terms of this contract. South African does not point to any expressed undertaking by ITO the breach of which entitles South African to recover over. We are satisfied, moreover, that South African has contracted away its right of recovery for breach of any implied warranty.

Although disclaimers of the implied warranty of workmanlike service are not looked upon with favor and are strictly construed, *David Crystal, Inc. v. Cunard Steam-Ship Co.,* 339 F.2d 295, 299-300 (2d Cir. 1964), *cert. denied,* 380 U.S. 976 (1965), it does not follow that a disclaimer cannot be effected with a properly drawn

clause. *See DeGioia v. United States Lines Co.,* 304 F.2d 421, 426 (2d Cir. 1962); *cf. Dery v. Wyer,* 265 F.2d 804, 810 (2d Cir. 1959) (even division of loss in railroad negligence case); *Alcoa Steamship Co. v. Charles Ferran & Co.,* 383 F.2d 46, 54-55 (5th Cir. 1967) ("red letter" clause limiting liability in ship repair contract); *Hudson Waterways Corp. v. Coastal Marine Service, Inc.,* 436 F. Supp. 597, 603-07 (E.D. Tex. 1977) (same). Where, as here, the contract between two business concerns operating at arms' length provides that "no warranty of any nature shall be implied", there is no good reason for "invoking some artificial rule of construction to cut down on the natural meaning of the words." *David Crystal, Inc. v. Cunard Steam-Ship Co., supra,* 339 F.2d at 301 (Friendly, J., concurring and dissenting in part). Accordingly, we affirm so much of the judgment appealed from as denies South African's claim for indemnity against ITO.

The matter is remanded to the district court with instructions to enter judgment in favor of plaintiff in the amount of $10,559.47 plus interest and costs. That portion of the judgment which denies South African recovery over against ITO is affirmed. Attorneys fees shall not be allowed any party.

APPENDIX C

Denial of Rehearing by the Circuit Court

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

76-7510

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the Tenth day of August, one thousand nine hundred and seventy-nine.

ELGIE & COMPANY,

Plaintiff-Appellant,

—VS.—

S.S. "S.A. NEDERBURG", her engines, boilers, etc., and SOUTH AFRICAN MARINE CORPORATION, LTD.

Defendant & Third Party Plaintiffs-Appellees,

SOUTH AFRICAN MARINE CORPORATION, LTD.

Defendant & Third Party Plaintiff-Appellee-Appellant,

—VS.—

INTERNATIONAL TERMINAL OPERATING COMPANY, INC.,

Third-Party Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellee South African Marine Corp., Ltd., and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestions,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN,
Chief Judge.